Supreme Court, U.S.
FILED
MAR 15 1994
OFFICE OF THE CLERK

No. 93-1357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: TIME WARNER INC.
SECURITIES LITIGATION

STEVEN J. ROSS, N.J. NICHOLAS, JR., GERALD M. LEVIN, BERT W. WASSERMAN, and TIME WARNER INC.,

Petitioners,

v.

ZVI TRADING CORP. EMPLOYEES' MONEY PURCHASE PENSION PLAN AND TRUST and BARRY ZONON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

STUART ROBINOWITZ
(Counsel of Record)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
Counsel for Petitioners/Cross-Respondents

Of Counsel
RICHARD A. ROSEN
ALISA D. SHUDOFSKY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Whether this Court should review the Second Circuit's decision which followed well-established legal principles, implicating no circuit conflicts, in concluding that defendants' comments about ongoing business discussions were not actionable in a securities fraud action where the complaint failed to allege the absence of a factual basis for those comments?

B. Whether this Court should review the Second Circuit's decision which followed well-established legal principles, implicating no circuit conflicts, in concluding that defendants were not liable for comments made by anonymous sources, newspaper columnists and financial analysts over whom defendants had no control?

TABLE OF CONTENTS[1/]

Page

COUNTERSTATEMENT 2
REASONS FOR DENYING THE CROSS-PETITION 3

ARGUMENT 3

I. THE SECOND CIRCUIT FOLLOWED WELL-SETTLED LEGAL PRINCIPLES IN HOLDING THAT DEFENDANTS' COMMENTS ABOUT POSSIBLE STRATEGIC ALLIANCES WERE NOT ACTIONABLE 3

II. THE SECOND CIRCUIT FOLLOWED WELL-SETTLED LEGAL PRINCIPLES IN HOLDING THAT DEFENDANTS ARE NOT LIABLE FOR STATEMENTS BY ANONYMOUS SOURCES, NEWSPAPER COLUMNISTS AND FINANCIAL ANALYSTS 6

CONCLUSION 9

[1/] A description of the parties to the proceeding and petitioners' Rule 29.1 statement appear at pages ii and 1a–13a of the Petition for Writ of Certiorari.

TABLE OF AUTHORITIES

Cases	Page(s)
In re Ann Taylor Store Securities Litigation, 807 F. Supp. 990 (S.D.N.Y. 1992)	8
Blue Chip Stamp v. *Manor Drugstores*, 421 U.S. 723 (1975)	9
In re Columbia Securities Litigation, 747 F. Supp. 237 (S.D.N.Y. 1990)	8
Cytryn v. *Cook*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,409 (N.D.Cal. July 2, 1990)	8
Dirks v. *SEC*, 463 U.S. 646 (1983)	7
Hanon v. *Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992)	6
Hershfang v. *Citicorp.*, 767 F. Supp. 1251 (S.D.N.Y. 1991)	7
Mayer v. *Mylod*, 988 F.2d 635 (6th Cir. 1993)	6
In re Network Equipment Technologies, Inc. Litigation, 762 F. Supp. 1359 (N.D. Cal. 1991)	7
Raab v. *General Physics Corp.*, 4 F.3d 286 (4th Cir. 1993)	7, 8
Schwartz v. *Novo Industri, A/S*, 658 F. Supp. 795 (S.D.N.Y. 1987)	7

Page(s)

Shapiro v. *UJB Financial Corp.*, 964 F.2d 272 (3d Cir.), *cert. denied*, 113 S. Ct. 365 (1992) 6

State Teachers Retirement Board v. *Fluor Corp.*, 654 F.2d 843 (2d Cir. 1981) 7, 8

In re Verifone Securities Litigation, 784 F. Supp. 1471 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993) 7

Virginia Bankshares, Inc. v. *Sandberg*, 111 S. Ct. 2749 (1991) 3, 5, 6

Statutes and Regulations

17 C.F.R. 240.10b-5 . . . . . passim

Federal Rules of Civil Procedure

Rule 9(b) 6, 8

No. 93-1357

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: TIME WARNER INC.
SECURITIES LITIGATION

STEVEN J. ROSS, N.J. NICHOLAS, JR., GERALD M. LEVIN, BERT W. WASSERMAN, and TIME WARNER INC.,

Petitioners,

v.

ZVI TRADING CORP. EMPLOYEES' MONEY PURCHASE PENSION PLAN AND TRUST and BARRY ZONON,

Respondents.

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioners/cross-respondents Time Warner Inc. ("TW") and the individual defendants filed a petition for a writ of certiorari requesting this Court to review the split decision of the Second Circuit upholding the Rule 10b-5 plaintiffs' irrational scienter theory. In response, respondents filed a conditional cross-petition in the event the Court grants the petition.[1/]

[1/] Different counsel filed two separate briefs in support of the cross-petition. They are referred to herein as "ZVI Cross-Pet." and "Zonon Br."

The "conditional" nature of the cross-petition underscores the conclusion that the issues raised by respondents do not involve unsettled questions of law or conflicts that merit plenary review by this Court.

COUNTERSTATEMENT

The factual background of the case is set forth in our Petition (at 2–4), to which we respectfully refer the Court. We here briefly summarize those portions of the record relevant to the questions raised by the cross-petition.

The complaint sets forth a series of general remarks by defendants (Pet. 24a-25a) concerning TW's ongoing talks with potential strategic alliance partners. The complaint concedes that those remarks were "true or issued with a reasonable basis and in good faith when originally made" (Compl. ¶ 53). But it alleges that those remarks later became misleading and that defendants should have disclosed, among other things, potential difficulties that arose as the talks progressed. The Second Circuit, like the District Court (Lasker, J.), unanimously held that those remarks were, as a matter of law, too cautious and indefinite to require later correction under the securities laws (Pet. 24a–26a, 56a–57a).

The complaint also sets forth, at some length, excerpts from a wide variety of financial analysts' reports and newspapers concerning the strategic alliance discussions (Pet. 21a–22a). Respondents concede that those third-party statements "were similar in nature and content to those directly attributed to petitioners" (ZVI Cross-Pet. 17). Those third-party accounts contain anonymous quotes, paraphrase remarks from alleged TW insiders, or merely report on TW's activities. The Second Circuit, like the District Court, unanimously held that, as a matter of law, defendants were not liable for comments by anonymous sources, reporters or analysts beyond their control (Pet. 20a–24a, 60a–64a).

REASONS FOR DENYING THE CROSS-PETITION

The questions raised by the conditional cross-petition do not merit review by this Court. The Second Circuit followed well-settled law. There are no conflicts among the circuits.

ARGUMENT

I.

THE SECOND CIRCUIT FOLLOWED WELL-SETTLED LEGAL PRINCIPLES IN HOLDING THAT DEFENDANTS' COMMENTS ABOUT POSSIBLE STRATEGIC ALLIANCES WERE NOT ACTIONABLE

Respondents claim that the Second Circuit ignored *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749 (1991), in concluding that defendants' comments about possible alliances were not actionable (ZVI Cross-Pet. 12-17; Zonon Br. 21-23). That is a meritless claim. Applying traditional legal analysis, the Second Circuit merely held that the particular allegations of the pleading in this case were deficient. The opinion is consistent with *Virginia Bankshares*.

The statements in the complaint attributed to defendants (Pet. 24a-25a) speak solely in terms of *possible* or *potential* alliances with *unnamed* parties on *unspecified* terms and at *indeterminate* times. There are no predictions of success or details as to the progress of the talks, the identity of the parties, the business terms, or the timetable (Pet. 24a-25a). Respondents do not claim, in their briefs or complaint, that defendants' statements were false when made or that defendants' expectations lacked a basis in fact. On the contrary, the complaint alleges that defendants' statements were "true or issued with a reasonable basis and in good faith when originally made" (Compl. ¶ 53).

The Second Circuit unanimously concluded that those cautious remarks did not contain affirmative misrepresentations (Pet. 25a–26a):

> We agree with the District Court that none of the statements constitutes an *affirmative* misrepresentation. Most of the statements reflect merely that talks are ongoing, and that Time Warner hopes that the talks will be successful. There is no suggestion that the factual assertions contained in any of these statements were false when the statements were made. As to expressions of opinion and the projections contained in the statements, while not beyond the reach of the securities laws, . . . the complaint contains no allegations to support the inference that the defendants either did not have these favorable opinions on future prospects when they made the statements or that the favorable opinions were without a basis in fact.

(emphasis in original, citations omitted).

The Second Circuit also unanimously rejected plaintiffs' claim that defendants had a duty to publicize potential problems that may have arisen in the course of the alliance discussions:

> [T]he attributed public statements lack the sort of definite positive projections that might require later correction. The statements suggest only the hope of any company, embarking on talks with multiple partners, that the talks would go well. No identified defendant stated that he thought deals would be struck by a certain date, or even that it was likely that deals would be struck at all. . . . These statements did not become materially misleading when the talks did not proceed well.

(Pet. 26a) (citation omitted).

The Second Circuit's conclusions, which mirror those of the District Court,[2/] do not break new legal ground. The Court of Appeals simply concluded that defendants' remarks, as set forth in the complaint in this case, were not false or misleading.

Contrary to respondents' claims (ZVI Cross-Pet. 12; Zonon Br. 22), the decision of the court below does not conflict with this Court's opinion in *Virginia Bankshares*. The Second Circuit specifically cites that decision and explains why its rationale does not apply here (Pet. 26a). In *Virginia Bankshares*, this Court held that an expression of opinion may be actionable if there is no factual basis for the opinion, or if the defendant does not really believe the opinion. The Court declared that expressions of opinion may be actionable when it is "reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." 111 S. Ct. at 2758. The Court added that "[a] statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 2759.

But here, as the Second Circuit and District Court emphasized, the views expressed by defendants did not lack a factual basis, nor was it alleged that defendants did not believe the

---

[2/] The District Court declared: "Plaintiffs do not claim that such negotiations did not occur or that Time Warner conducted them in bad faith. . . . None of the attributed statements makes a specific representation as to progress toward completion of the talks or likely partners or any other false affirmative statement." (Pet. 56a). The District Court added that "defendants' statements simply expressed their enthusiasm about ongoing negotiations," and that the complaint was marked by an "absence of factual allegations showing that defendants made falsely optimistic predictions" (Pet. 56a-57a).

statements when made. The opinion below is thus fully in accord with *Virginia Bankshares*.[2/]

II.

THE SECOND CIRCUIT FOLLOWED WELL-SETTLED LEGAL PRINCIPLES IN HOLDING THAT DEFENDANTS ARE NOT LIABLE FOR STATEMENTS BY ANONYMOUS SOURCES, NEWSPAPER COLUMNISTS AND FINANCIAL ANALYSTS

Respondents claim that the Second Circuit's opinion conflicts with decisions by other courts (mainly district courts) in holding that statements by anonymous sources, newspaper reporters and financial analysts are not actionable (ZVI Cross-Pet. 17-28; Zonon Br. 19-26). The Second Circuit's opinion on this point reflects well-accepted law. There are no circuit conflicts or unsettled questions.

The stringent pleading requirements of Rule 9(b) in securities fraud actions—designed to reduce strike suits (Pet. 11 n.7)—require a Rule 10b-5 complaint to identify "the speaker[ ] and content of the alleged misrepresentations in the complaint" (Pet. 60a). The Second Circuit followed traditional law in holding that defendants could not be liable for statements by anonymous sources, newspaper reporters or financial analysts over whom they exercised no control (Pet. 20a-24a, 60a-64a).

Noting that these third-party statements "add little to the statements for which Time Warner is concededly responsible" (Pet. 20a), the court of appeals concluded:

[2/] The other precedents cited by respondents—*Mayer* v. *Mylod*, 988 F.2d 635 (6th Cir. 1993); *Hanon* v. *Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992); and *Shapiro* v. *UJB Financial Corp.*, 964 F.2d 272 (3d Cir.), *cert. denied*, 113 S.Ct. 365 (1992)—merely repeat *Virginia Bankshare*'s holding that opinions are actionable if neither believed nor factually based. Those defects are not present here.

> Judge Lasker understood Rule 9(b) to require, at a minimum, that the plaintiff identify the speaker of the allegedly fraudulent statements. We believe that he was correct.

(Pet. 22a).

Far from imposing a "Draconian" interpretation of Rule 9(b) (ZVI Cross-Pet. 19), the court below followed a long line of unbroken precedents. *See, e.g., Raab* v. *General Physics Corp.*, 4 F.3d 286, 288-89 (4th Cir. 1993) (affirming dismissal of 10b-5 claim, holding, "The securities laws . . . do not require [a] company to police statements made by third parties for inaccuracies, even if the third party attributes the statement to [defendants]. Without control over [the analyst] report, any statement made by [defendant] personnel could be taken out of context, incorrectly quoted, or stripped of important qualifiers."); *In re Verifone Securities Litigation*, 784 F. Supp. 1471 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993) (dismissing 10b-5 complaint alleging that defendants were liable for statements by stock analysts); *Schwartz* v. *Novo Industri, A/S*, 658 F. Supp. 795, 799 (S.D.N.Y. 1987) (Weinfeld, J.) (dismissing 10b-5 action because court cannot infer fraud from a statement appearing in news article "over which defendant had less than complete control"); *Hershfang* v. *Citicorp.*, 767 F. Supp. 1251, 1259 (S.D.N.Y. 1991) (dismissing 10b-5 action where plaintiff "stitched together a patchwork of newspaper clippings and proclaimed the result a tale of securities fraud"); *In re Network Equipment Technologies, Inc. Litigation*, 762 F. Supp. 1359, 1367 (N.D. Cal. 1991) (striking allegations in a 10b-5 complaint based on statements of financial analysts). *See also State Teachers Retirement Board* v. *Fluor Corp.*, 654 F.2d 843, 850 (2d Cir. 1981) ("A company has no duty to correct or verify rumors in the marketplace unless those rumors can be attributed to the company.")[4/]

[4/] These precedents reflect the strong policy articulated in *Dirks* v. *SEC*, 463 U.S. 646, 658 & n.17 (1983), that market efficiency is (continued...)

Respondents' argument, in the final analysis, boils down to a demand for discovery in order to determine whether plaintiffs can create a cause of action—*i.e.*, whether there is any link between defendants and the anonymous and unattributed statements. (*See* ZVI Cross-Pet. 28.) That argument, if accepted, would gut Rule 9(b)'s rigorous requirements for pleading fraud actions and

---

[4/](...continued)
significantly enhanced by efforts of analysts who "remain free" to obtain information from corporate sources. Permitting securities actions against corporations based on the independent musings of financial analysts and newspaper reporters would unfairly penalize companies for statements over which they have no control and impose on them the impossible duty of policing third-party comments. *See, e.g., Raab* v. *General Physics Corp.*, 4 F.3d at 288; *State Teachers Retirement Board* v. *Fluor*, 654 F.2d at 850.

The cases cited by respondents (ZVI Cross-Pet. 22-25)—distinguished by the Second Circuit and District Court (Pet. 22a, 60a-61a)—are clearly inapposite. *In re Ann Taylor Store Securities Litigation*, 807 F. Supp. 990 (S.D.N.Y. 1992), for example, involved statements in a press release issued by the defendant. *In re Columbia Securities Litigation*, 747 F. Supp. 237 (S.D.N.Y. 1990), involved a positive identification of the speakers of the allegedly fraudulent statements. *Cytryn* v. *Cook*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,409 (N.D. Cal. July 2, 1990), involved company press releases and allegations of statements to analysts by identified defendants.

open the floodgates to vexatious 10b-5 suits contrary to the policy of *Blue Chip Stamp* v. *Manor Drugstores*, 421 U.S. 723 (1975).

Conclusion

For all the reasons demonstrated above, the Court should deny the conditional cross-petition for a writ of certiorari.

Dated: New York, New York
March 14, 1994

Respectfully submitted,

STUART ROBINOWITZ
(Counsel of Record)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel for Petitioners/Cross-Respondents

Of Counsel:

Richard A. Rosen
Alisa D. Shudofsky

Supreme Court, U.S.
FILED
MAR 31 1994
OFFICE OF THE CLERK

No. 93-1357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: TIME WARNER INC. SECURITIES LITIGATION.

ZVI TRADING CORP. EMPLOYEES' MONEY PURCHASE PENSION PLAN AND TRUST and BARRY ZONON,

Cross-Petitioners,

vs.

STEVEN J. ROSS, N.J. NICHOLAS, JR., GERALD M. LEVIN, BERT W. WASSERMAN, and TIME WARNER INC.,

Cross-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION IN CONNECTION WITH CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

DAVID J. BERSHAD
Counsel of Record
MILBERG WEISS BERSHAD HYNES & LERACH
One Pennsylvania Plaza
New York, New York 10119-0165
(212) 594-5300
Cross-Petitioners' Lead Counsel

ARTHUR R. MILLER
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4111
Counsel to Cross-Petitioners

MUCH SHELIST FREED DENENBERG & AMENT, P.C.
200 North LaSalle Street
Suite 2100
Chicago, Illinois 60601-1095
(312) 346-3100
Cross-Petitioners' Counsel

TABLE OF CONTENTS

Page

Table of Authorities ii

I. Defendants' Statements Regarding Strategic Alliances Were Materially Misleading Under The Federal Securities Laws 3

II. Statements Made By Unidentified Corporate "Spokespersons" To Journalists And Analysts Are Actionable Under Section 10(b) . 13

Conclusion 18

TABLE OF AUTHORITIES

CASES

In re Apple Computer Secs. Litig., 886 F.2d 1109 (9th Cir. 1989), cert. denied, 496 U.S. 943 (1990) 2, 7, 15

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) 2, 12

Brickman v. Tyco Toys, Inc., 731 F. Supp. 101 (S.D.N.Y. 1990) 13

Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993) . . 2, 15

Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980) 6

Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992) 7

Hoxworth v. Blinder Robinson & Co., 903 F.2d 186 (3d Cir. 1990) 8

Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993) . . . 8

McMahan & Co. v. Wherehouse Entertainment, Inc., 900 F.2d 576 (2d Cir. 1990), cert. denied, 111 S. Ct. 2887 (1991) 5

In re Meridian Secs. Litig., 772 F. Supp. 223 (E.D. Pa. 1991) . 8

Midlantic Corporation Shareholder Litigation, 758 F. Supp. 226 (D.N.J. 1990) 8

Raab v. General Physics Corp., 4 F.3d 286 (4th Cir. 1993), ... 16

Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987) 5

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969) 5

Schlanger v. Four-Phase Sys., Inc., 582 F. Supp. 128 (S.D.N.Y. 1984) . 5

Schwartz v. Novo Industri, A/S, 658 F. Supp. 795 (S.D.N.Y. 1987) 17

State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843 (2d Cir. 1981) . 16

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) 12

In re Verifone Secs. Litig., 11 F.3d 865, 871 n.8 (9th Cir. 1993) . . . 16

Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991) . 2, 8, 10, 11

In re Warner Communications Secs. Litig., 618 F. Supp. 735 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986) 6

REPLY TO BRIEF IN OPPOSITION

Cross-respondents' brief in opposition argues that the conditional cross-petition should not be granted because the Second Circuit followed well-settled law in holding that cross-respondents' statements concerning strategic alliances, including statements by unidentified Time Warner spokespersons to the news media and financial analysts, which caused the price of Time Warner's stock to rise from $86 per share to $119 per share during the class period, were not actionable under the federal securities laws. Cross-respondents maintain that the decision below did not create a conflict among the Circuits. The conditional cross-petition demonstrated, however, that the Second Circuit's decision with respect to these issues merits review by this Court because it:

(1) undermines the philosophy of full and fair disclosure underlying the federal securities laws recognized by this Court in, inter alia, Basic, Inc. v. Levinson, 485 U.S. 224, 230 (1988); (2) ignored or misapplied decisions of this Court, including Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991); and (3) conflicts with decisions of other Circuits, see, e.g., Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1262 (4th Cir. 1993); In re Apple Computer Secs. Litig., 886 F.2d 1109, 1116 (9th Cir. 1989), cert. denied, 496 U.S. 943 (1990), that have recognized the materiality and market impact of statements reported by the news media and financial analysts.

I.

DEFENDANTS' STATEMENTS REGARDING STRATEGIC ALLIANCES WERE MATERIALLY MISLEADING UNDER THE FEDERAL SECURITIES LAWS

As demonstrated in cross-petitioners' opening brief, the Second Circuit's stated rationale for dismissing the public statements made by defendants prior to May 1, 1991, conflicts directly with controlling authorities from this Court and other Circuits. According to the Second Circuit, because defendants' pre-May 1, 1991, statements regarding strategic alliances were not "definite positive projections," they "did not become materially misleading when the talks did not proceed well" (Pet. 26a).[1] The decision below mischaracterized the challenged

---

[1] Citations to the petition for certiorari filed by Time Warner Inc. and certain of its senior executive officers (together, "defendants" or "cross-respondents") are in this form.

statements, ignored an entire body of case law governing the actionability of general statements of belief and optimism, and constituted an unwarranted factual determination on a motion to dismiss under Federal Rule 12(b)(6).

While the Second Circuit analyzed defendants' statements only as if they were "forward-looking" or projections, in fact, defendants' statements were misstatements of fact. For example, on November 30, 1990, the Wall Street Journal quoted defendant Steven J. Ross ("Ross") as stating that Time Warner "continues to have serious talks," (Pet. 24a n.3), and on May 13, 1991, Business Week quoted Ross as stating that Time Warner was "making alliances at the subsidiary level," (id.). It is axiomatic that such statements gave rise to a duty to be completely truthful concerning the progress of defendants'

negotiations with potential strategic partners. See Roeder v. Alpha Indus., Inc., 814 F.2d 22, 26 (1st Cir. 1987)(when "a corporation does make a disclosure -- whether it be voluntary or required -- there is a duty to make it complete and accurate"); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860-61 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Schlanger v. Four-Phase Sys., Inc., 582 F. Supp. 128, 133 (S.D.N.Y. 1984)(same). A statement that accurately discloses some facts, but creates a false or erroneous impression by omitting other facts necessary for a true understanding, is misleading under the federal securities laws. See McMahan & Co. v. Wherehouse Entertainment, Inc., 900 F.2d 576, 579 (2d Cir. 1990), cert. denied, 111 S. Ct. 2887 (1991) ("the disclosure required by the securities laws is measured not by